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 10 REALNETWORKS, INC. and  
 REALNETWORKS HOME  
 11 ENTERTAINMENT, INC.

12 (additional counsel listed on following page)

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 REALNETWORKS, INC., a Washington  
 Corporation; and REALNETWORKS HOME  
 16 ENTERTAINMENT, INC., a Delaware  
 corporation,

17 Plaintiffs,

18 v.

19 DVD COPY CONTROL ASSOCIATION, INC., a  
 20 Delaware nonprofit corporation, DISNEY  
 ENTERPRISES, INC., a Delaware corporation;  
 21 PARAMOUNT PICTURES CORP., a Delaware  
 corporation; SONY PICTURES ENTER., INC., a  
 22 Delaware corporation; TWENTIETH CENTURY  
 FOX FILM CORP., a Delaware corporation; NBC  
 23 UNIVERSAL, INC., a Delaware corporation;  
 WARNER BROS. ENTER. INC., a Delaware  
 24 corporation; and VIACOM, Inc., a Delaware  
 Corporation,

25 Defendants.  
 26

27 AND RELATED CASES  
 28

Case Nos. C08 04548 MHP;  
 C08 04719 MHP

**PLAINTIFFS' MOTION FOR LEAVE  
 TO FILE SECOND AMENDED  
 COMPLAINT FOR DECLARATORY  
 RELIEF AND VIOLATION OF  
 SHERMAN ACT AND STATE LAW**

**Before: Hon. Marilyn Hall Patel  
 Dept: Courtroom 15  
 Date: June 22, 2009  
 Time: 2:00 p.m.**

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**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on June 22, 2009 at 2:00 p.m. or at such date and time as the Court may establish, Plaintiffs and Counterclaim Defendants RealNetworks, Inc. and RealNetworks Home Entertainment, Inc. (collectively, “RealNetworks”) will and hereby do move pursuant to Fed. R. Civ. P. 15(a) for an Order permitting RealNetworks to file a Second Amended Complaint to add new claims against the DVD Copy Control Association (“DVD CCA”) and Disney Enterprises, Inc., Paramount Pictures Corp., Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corp., Warner Brothers Entertainment, Inc., NBC Universal, Inc. and Viacom, Inc. (collectively, the “Studio Defendants”).

This Motion is based on this Notice of Motion and Motion, including the Memorandum of Points and Authorities set forth below, the [Proposed] Second Amended Complaint for Declaratory Relief and Violation of Sherman Act and State Law attached as Exhibit A hereto,<sup>1</sup> the pleadings and papers on file with the Court, the argument of counsel, and on any other matters properly before the Court.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. ISSUE TO BE DECIDED (LOCAL RULE 7-4(A)(3))**

Should RealNetworks be granted leave to amend its responsive pleadings to assert its antitrust claims against the Studio Defendants and the DVD CCA under Rule 15(a)?

**II. INTRODUCTION**

RealNetworks respectfully moves this Court for leave to add antitrust claims against the Studio Defendants and the DVD CCA. Through discovery in this case relating to the DVD CCA’s and the Studio Defendants’ request for a preliminary injunction, RealNetworks has

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<sup>1</sup> Real’s proposed Second Amended Complaint will be asserted against all of the parties that are named as defendants in its original action, including all seven Studios and the DVD CCA. Real is also separately filing certain of these new causes of actions as counterclaims against the DVD CCA. Leave is not required to assert these counterclaims against the DVD CCA because Real has not yet answered DVD CCA’s Counterclaims filed on January 12, 2009, and is therefore asserting its Sherman Act and state law counterclaims against the DVD CCA in conjunction with its Answer to the DVD CCA’s Counterclaims.

1 become aware of facts demonstrating that the DVD CCA and the Studio Defendants have  
2 engaged in both a horizontal group boycott of RealNetworks and, in the case of the Studio  
3 Defendants alone, a collective refusal to deal with RealNetworks. The testimony of the Studio  
4 Defendants during the preliminary injunction hearing further confirmed the existence of a  
5 horizontal conspiracy between the Studio Defendants and involving the DVD CCA. In that  
6 testimony, witnesses for the Studio Defendants (Ms. King and Dr. Kelly) unambiguously  
7 confirmed the Studios' position that the CSS License Agreement resulted from a joint agreement  
8 among the Studios to prohibit all copies of DVD content unless the Studios jointly authorize the  
9 making of such a copy. Pursuant to the Studios' and DVD CCA's interpretation of the CSS  
10 License Agreement, each Studio has ceded its individual authority to authorize the use of its  
11 movie content through *individual* copyright licenses in favor of a *joint agreement* to grant or  
12 withhold the use of such content– the CSS License Agreement. *See* Tr. 74:1-12; 79:22-80:3;  
13 87:16-88:4; 98:10-23; 111:22-112:5 (testimony of Ms. King). Under the Studios' and the DVD  
14 CCA's interpretation, no DVD CCA licensee can obtain rights to copy any individual Studio's  
15 content without joint agreement among the Studios. The conduct at issue is *per se* unlawful  
16 under Section 1 of the Sherman Act and also violates California law.

17 As the Court is aware, in 2008, RealNetworks sought to meet strong consumer demand  
18 among DVD owners for affordable technology that would enable them to save a secure copy of  
19 their DVDs to a computer hard drive for safekeeping, portability, easy retrieval, and later  
20 playback. It developed two innovative products – the RealDVD software known as “Vegas” and  
21 the New Platform (code named “Facet” prior to its commercial release) – that allow users to save  
22 and play a secure backup copy of the DVDs they own and to organize their favorite movies, TV  
23 shows, scenes and actors so that they are all just a click away. The conduct described in the  
24 claims that RealNetworks seeks leave to assert reflects a concerted and unlawful effort on the  
25 part of the Studio Defendants and the DVD CCA to eliminate competition from RealNetworks in  
26 the market for technology that enables a consumer to make a lawful, secure backup copy of  
27 DVDs that she owns. The exclusionary conduct of the Studio Defendants and the DVD CCA  
28

1 deprives consumers of innovative and affordable technology to meet their demands and to enable  
2 them to exercise their fair use right to make these backup copies.

3 Under Rule 15(a), leave to amend is liberally granted and it is an abuse of discretion to  
4 deny leave in the absence of a showing of prejudice or bad faith, or without a showing that the  
5 proposed amendment is frivolous. *See Cooper Dev. Co. v. Employers Ins. of Wausau*, 765 F.  
6 Supp. 1429, 1432 (N.D. Cal. 1991) (“Leave to amend should be denied only when there is a  
7 showing of undue delay, bad faith, futility of amendment or prejudice to the opposing party.”).  
8 Delay alone does not provide a sufficient basis for denying leave to amend. *Hurn v. Retirement*  
9 *Fund Trust of Plumbing, Heating & Piping Industry of So. Calif.*, 648 F.2d 1252, 1254 (9th Cir.  
10 1981).

11 Here, none of the factors weighing against granting leave to amend is present. Since  
12 becoming aware of the conduct giving rise to these claims, RealNetworks has been working  
13 diligently to confirm that it has a sufficient evidentiary basis to assert the claims. This evidence  
14 has come through RealNetworks’ investigation of the underlying facts, including discovery  
15 undertaken in connection with the preliminary injunction proceedings, and has been confirmed  
16 and strengthened by evidence adduced at the preliminary injunction hearing. The Studio  
17 Defendants and the DVD CCA will suffer no prejudice as a result of this amendment. Fact  
18 discovery is in its early stages, and they will have ample opportunity to prepare a defense to  
19 these claims. Moreover, granting leave here will simply assure that these claims will go forward  
20 against all of the involved parties as opposed to only one (the DVD CCA, as to which no leave is  
21 required (*see* footnote 1, *supra*)).

### 22 **III. PROCEDURAL BACKGROUND**

23 This litigation was formally initiated before this Court when RealNetworks filed its  
24 Complaint for Declaratory Relief on September 30, 2008. [Dkt. No. 1] RealNetworks sought  
25 declaratory relief from Defendants’ assertions that (a) the RealDVD product violates the CSS  
26 License Agreement, and (b) the RealDVD product violates the anti-circumvention provisions of  
27 the Digital Millennium Copyright Act. Four of the Studio Defendants responded to  
28 RealNetworks’ Complaint on October 3, 2008, by renewing their prior application for a

1 temporary restraining order, and on that same date five of the Defendants (Disney, Paramount,  
2 Sony, Fox and Warner Brothers) filed a Counter-Complaint against RealNetworks asserting the  
3 same causes of action as to which RealNetworks had sought declaratory relief. [Dkt. Nos. 8 and  
4 15] RealNetworks filed its Answer to the Counter-Complaint on October 31, 2008. [Dkt. No.  
5 57]

6 RealNetworks sought leave to amend its declaratory judgment complaint to add the Facet  
7 product on November 11, 2008. [Dkt. No. 62] Leave was granted by this Court on December  
8 23, 2008. [Dkt. No. 92]

9 This Court granted the Studio Defendants' and DVD CCA's request to extend the  
10 temporary restraining order on October 9, 2008. [Dkt. No. 45] Since that time, the parties have  
11 been conducting discovery and other activities in preparation for and in furtherance of the  
12 preliminary injunction hearing. To date, the Court has heard testimony and argument on the  
13 preliminary injunction motion on April 24, 28, 29 and May 7, 2009. Closing arguments are  
14 currently set for May 21, 2009. All fact discovery and motion practice to date has been in  
15 furtherance of these preliminary injunction proceedings.

#### 16 **IV. ARGUMENT**

17 Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading "shall be  
18 freely given when justice so requires" and reflects an underlying policy that disputes should be  
19 determined on their merits, and not on the technicalities of pleading rules. Fed. R. Civ. P. 15(a);  
20 *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Rule 15(a) has been consistently applied in this  
21 district and circuit to grant leave unless there is a showing of prejudice, undue delay, bad faith or  
22 "futility of amendment." *Cooper Dev. Co.*, 765 F. Supp. at 1432; *see also Bowles v. Reade*, 198  
23 F.3d 752, 757 (9th Cir. 1999); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079  
24 (9th Cir. 1990); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *Advanced*  
25 *Cardiovascular Sys. v. SciMed Life Sys.*, 989 F. Supp. 1237, 1241 (N.D. Cal. 1997).

26 The four factors that are relevant to determining whether leave should be granted are: (1)  
27 whether there has been undue delay; (2) whether the moving party has acted in bad faith or with  
28 a "dilatory motive"; (3) whether the amendment would be futile because the claims appear on

1 their face to be frivolous; and (4) whether the non-moving party would be prejudiced by granting  
2 leave to amend. *Foman*, 371 U.S. at 182. Importantly, delay alone is an insufficient basis upon  
3 which to deny leave to amend. *Hurn*, 648 F.2d at 1254 (denial of motion for leave to amend held  
4 to be an abuse of discretion even though motion made five years after the original complaint was  
5 filed). In the Ninth Circuit, the non-moving party bears the burden of demonstrating why leave  
6 to amend should be denied.

7 Here, as set forth below, none of the four relevant factors supports denying leave to  
8 amend.

9 **A. Amendment Will Not Prejudice the Studio Defendants or the DVD CCA**

10 There will be no prejudice to the Studio Defendants or the DVD CCA by granting  
11 RealNetworks leave to file its proposed Second Amended Complaint. These proceedings are at  
12 an early stage, and there will be ample time for the Studio Defendants and the DVD CCA to do  
13 whatever discovery or motion practice they believe is necessary to defend against these claims.  
14 No pre-trial deadlines or trial date have been scheduled yet in the case. Moreover, since the  
15 DVD CCA will under any circumstances have to defend against these claims in this litigation  
16 (again, for which no leave to file is required), discovery relating to the proposed claims will be  
17 on-going in any event.

18 More importantly, the claims that RealNetworks seeks to assert go to the heart of the  
19 Studio Defendants' and the DVD CCA's claims against RealNetworks and undermine their  
20 fundamental justification for the imposition of liability on RealNetworks. They are thus  
21 inextricably intertwined with the pre-existing claims in this litigation and derive from the same  
22 set of operative facts. Their assertion against the Studio Defendants and the DVD CCA will not  
23 alter the nature of the litigation in any fundamental way and, instead, will permit the Court to  
24 consider all of the facts and legal theories relevant to the claims that have already been asserted  
25 in this litigation. Under circumstances such as these, the Studio Defendants will be unable to  
26 carry their burden of demonstrating prejudice for the simple reason that no prejudice will result  
27 from granting the leave requested. *See Hip Hop Beverage Corp. v. RIC Representacoes*  
28 *Importacao e Comercio Ltda.*, 220 F.R.D. 614, 622 (C.D. Cal. 2003) (finding no prejudice where



1 “the issues contained in [the] proposed claims are substantially related to the issues contained in  
2 [the] Plaintiffs’ Complaint”).

3 **B. RealNetworks Has Acted in Good Faith in Asserting These Claims and There**  
4 **Has Been No Undue Delay**

5 There is no evidence that RealNetworks is asserting these claims for a “wrongful motive”  
6 or that it engaged in “undue delay” before filing them. *See DCD Programs*, 833 F.2d at 187. As  
7 set forth above, the assertion of these claims will allow this Court to consider the Studio  
8 Defendants’ and the DVD CCA’s breach of contract and circumvention allegations in the  
9 appropriate factual and theoretical context. Nor is there evidence that RealNetworks is asserting  
10 these claims at this time for any tactical or strategic reason. *See id.* (declining to conclude that  
11 the time it took to assert the claims was evidence of bad faith, where timing resulted from  
12 completion of factual investigation); *cf. Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir.  
13 1987) (upholding denial of leave to amend on grounds of bad faith where district court had  
14 concluded that the proposed amendment was designed simply to destroy jurisdiction of the  
15 court). To the contrary, RealNetworks adjusted the timing of its request for leave to assert these  
16 claims in large part to minimize any potential disruption of the preliminary injunction  
17 proceedings.<sup>2</sup>

18 The exclusionary conduct engaged in by the Studio Defendants and the DVD CCA goes  
19 to the heart of the Studio Defendants’ and the DVD CCA’s allegations of unlawful conduct by  
20 RealNetworks. As RealNetworks has uncovered and analyzed the evidence, it has worked  
21 diligently to formulate its claims based on that evidence and to test its assertions against the law

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22 <sup>2</sup> Real sought and received an extension of time to file its response to the DVD CCA’s  
23 Counterclaims from March 30, 2009 to May 13, 2009. *See Stipulation and Order Extending*  
24 *Time for Plaintiffs and Counterclaim Defendants To Answer the Counterclaims of Defendant*  
25 *and Counterclaim Plaintiff DVD CCA [Dkt No. 243]*. At that time, the preliminary injunction  
26 proceedings were scheduled to be held on April 24, 28 and 29, 2009. Real’s request to postpone  
27 the filing of its response to the DVD CCA’s counterclaims until after the then-scheduled  
28 preliminary injunction hearing was in large part to avoid any interference with or distraction  
from those proceedings. When closing arguments were postponed until May 21, 2009, Real  
requested a further extension of its time to respond to the DVD CCA’s counterclaims until after  
the completion of the preliminary injunction proceedings. The DVD CCA, however, declined to  
stipulate to a further extension of Real’s time to respond, thus requiring Real to respond to the  
DVD CCA’s counterclaims on or before May 13, 2009.



1 relating to horizontal group boycotts. Having done so, RealNetworks reached the conclusion  
2 that the Studio Defendants and the DVD CCA have used their allegations regarding the scope of  
3 the CSS License Agreement to cloak an underlying unlawful agreement amongst the Studios that  
4 no Studio alone can authorize the making of a copy or copies of a DVD embodying a  
5 copyrighted work that that Studio owns for any purpose.<sup>3</sup> Thus, pursuant to the Studios' and the  
6 DVD CCA's interpretation of the CSS License Agreement, Fox cannot authorize RealNetworks  
7 to build technology that permits a consumer to make a copy of a Fox motion picture DVD  
8 without the permission of Universal and Warner Brothers and Disney and so on. There is no  
9 justification for this restriction and its plain result is a group boycott of technology providers like  
10 RealNetworks. By seeking leave to amend to assert its claims, RealNetworks simply seeks to  
11 have the opportunity to complete factual discovery on its Sherman Act and state law claims and  
12 have them decided by a Court.

13 **C. Amendment Will Not Be Futile**

14 "If the underlying facts or circumstances relied upon by a plaintiff may be a proper  
15 subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*,  
16 371 U.S. at 182. Here, there is no question that the amendment that RealNetworks seeks will *not*  
17 be futile. The antitrust claims that RealNetworks seeks leave to assert are well-grounded in case  
18 law and are supported by concrete facts. In fact, the Federal Circuit recently analyzed whether a  
19 claim for patent misuse arising out of a joint refusal to license a patent in a way that would  
20 permit the development of competing technologies could constitute a violation of the Sherman  
21 Act. *Princo Corp. v. Int'l Trade Comm'n*, No. 2007-1386, 2009 WL 1035222 (Fed. Cir. April  
22 20, 2009). Reversing the International Trade Commission's dismissal of Princo's patent misuse  
23 claim, the Federal Circuit stated:

24 \_\_\_\_\_  
25 <sup>3</sup> The Studios argue that consumers need Studio authority to make even a single, fair use  
26 copy of a purchased DVD, an argument Real disputes as contrary to copyright law. *See* 17  
27 U.S.C. §107. Regardless, as interpreted by the Studios and the DVD CCA, the CSS Agreement  
28 prohibits an individual Studio from authorizing a copy or copies of the Studio's own movie to be  
made from a CSS-protected DVD for *any* reason – fair use or otherwise. According to the  
Studios' and the DVD CCA's interpretation of the CSS Agreement, authority to copy a work  
owned by an individual Studio can only be procured from all of the Studios, acting in concert.

1 In contrast, here Princo contends that Philips and Sony agreed from the outset to license  
2 Lagadec, a potential competitor to the Raaymakers pool patents, in a way that would  
3 necessarily prevent it from ever becoming a commercially viable alternative technology  
4 that might compete with the Orange Book standard. . . . It is one thing to offer a pooled  
5 license to competing technologies; it is quite another to refuse to license competing  
6 technologies on any other basis. In contrast to tying arrangements, there are no benefits  
7 to be obtained from an agreement between patent holders to forego separate licensing of  
8 competing technologies . . . .”

9 *Id.* at \*13.

10 So too, here. Through their interpretation of the CSS License Agreement, the Studio  
11 Defendants and the DVD CCA agreed, from the outset, that the Agreement would preclude all  
12 copying, regardless of whether that copying could otherwise be licensed individually by a given  
13 Studio or was lawful without a license under the fair use doctrine. In so doing, they, like Philips  
14 and Sony in *Princo*, entered into an agreement that necessarily prevents competition from third  
15 parties like RealNetworks (and Kaleidescape). Given the nature of the claims that RealNetworks  
16 seeks leave to assert, there is no viable argument that the assertion of the claims will be futile.  
17 *See Hip Hop Beverage*, 220 F.R.D. at 622-23 (“An amendment is ‘futile’ only if it would clearly  
18 be subject to dismissal.”) (citing *DCD Programs*, 833 F.2d at 188).

19 **V. CONCLUSION**

20 For the foregoing reasons, RealNetworks respectfully requests that the Court grant its  
21 Motion for Leave to File its Second Amended Complaint for Declaratory Relief and Violation of  
22 Sherman Act and State Law against the Studio Defendants.

23 Dated: May 13, 2009

WILSON SONSINI GOODRICH & ROSATI  
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24 By: /s/ Leo P. Cunningham  
25 Leo P. Cunningham

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28 REALNETWORKS HOME  
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 10 REALNETWORKS, INC. and  
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 11 ENTERTAINMENT, INC.

12 (additional counsel listed on following page)

13 UNITED STATES DISTRICT COURT  
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15 REALNETWORKS, INC., a Washington  
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18 v.

19 DVD COPY CONTROL ASSOCIATION, INC., a  
 20 Delaware nonprofit corporation, DISNEY  
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**[PROPOSED] SECOND AMENDED  
 COMPLAINT FOR DECLARATORY  
 RELIEF AND VIOLATION OF  
 SHERMAN ACT AND STATE LAW**

**JURY TRIAL DEMANDED**

27 AND RELATED CASES

28

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1           1.       This is an action for (1) a declaratory judgment pursuant to 28 U.S.C. § 2201 and  
2 28 U.S.C. § 2202, brought by RealNetworks, Inc. (“RealNetworks”) and RealNetworks Home  
3 Entertainment, Inc. (“RealNetworks Home”) (together, “Plaintiffs”) by and through counsel,  
4 against defendants Disney Enterprises, Inc., Paramount Pictures Corp., Sony Pictures  
5 Entertainment, Inc., Twentieth Century Fox Film Corp., NBC Universal, Inc., Warner Bros.  
6 Entertainment, Inc., Viacom, Inc. (collectively the “Studio Defendants”) and DVD Copy Control  
7 Association (“DVD CCA”) (where the Studio Defendants and the DVD CCA shall be referred to  
8 collectively as “Defendants”) for the purpose of determining a question of actual controversy and  
9 the rights and obligations between the parties (“Declaratory Relief”); and (2) a judgment against  
10 Defendants for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, the California  
11 Cartwright Act, Bus. & Prof. Code § 16700 *et seq.*, and the California Unfair Competition Law,  
12 Bus. & Prof. Code § 17200 *et seq.* (“Antitrust Claims”), as follows:

13                               **JURISDICTION, VENUE AND INTERSTATE COMMERCE**

14           2.       This court has jurisdiction over the claims asserted for declaratory relief because  
15 the underlying action concerns a federal question. The Defendants in this matter would be filing a  
16 claim against one or more of Plaintiffs under the DMCA. Because the crux of this matter involves  
17 a federal right, this court properly maintains jurisdiction over this action for declaratory relief  
18 under the DMCA under 28 U.S.C. § 1331. This court has jurisdiction over the claims for violation  
19 of Section 1 of the Sherman Act under 28 U.S.C. § 1331 and 1337(a). This court has  
20 supplemental jurisdiction of all other claims under 28 U.S.C. § 1367.

21           3.       Venue is proper in this court pursuant to 28 U.S.C. § 1391(a)(2), because a  
22 substantial part of the events or omissions giving rise to the claims occurred in this District.  
23 Additionally, pursuant to § 10.4 of the CSS License Agreement, exclusive jurisdiction and venue  
24 over any dispute arising out of the agreement exists in the federal and state courts of Santa Clara  
25 County, California.

26           4.       The actions complained of have occurred in and substantially affect interstate  
27 commerce.

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**INTRADISTRICT ASSIGNMENT**

5. Pursuant to Civil Local Rule 3-2(c), this action may be assigned on a district-wide basis.

**THE PARTIES**

6. RealNetworks is a Washington corporation with its principal place of business in Seattle, Washington. It is engaged in the business of, among other things, developing, manufacturing, and selling platforms for the delivery of digital media. Consumers use RealNetwork’s services and software to find, play, purchase and manage free and premium digital content, including music, games and video. Broadcasters, network operators, media companies and enterprises use RealNetwork’s products and services to create and deliver digital media to PCs, mobile phones and other consumer electronics devices. RealNetwork’s RealPlayer product is an innovative award-winning technology that was one of the first media players capable of streaming media over the Internet.

7. RealNetworks Home Entertainment, Inc. is a Delaware corporation with its principal place of business in Seattle, Washington. It is a subsidiary of RealNetworks, and it is the entity that distributes the RealDVD product, also known as Vegas, and is developing and will distribute the New Platform, also known as Facet.

8. The DVD CCA is a Delaware nonprofit corporation, having offices located in Morgan Hill, California. According to the allegations of its Amended Answer and Counterclaims, the DVD CCA is responsible for developing, evaluating and licensing copy control and related technologies to participants at various levels in the DVD industry. DVD CCA is the licensor of the Content Scramble System. DVD CCA licenses the Content Scramble System technologies to companies that manufacture hardware and software products that play back to viewers CSS-protected DVDs, recordable discs and related products, and to motion picture studios and other companies whose audio-visual works are encrypted using the Content Scramble System. DVD CCA granted a license in the CSS technology to RealNetworks in the form of a written CSS License Agreement. The Studio Defendants are members of the DVD CCA. Upon information and belief, the other members of the DVD CCA are consumer electronics companies and

1 computer manufacturers. Upon information and belief, there are twelve seats on the DVD CCA's  
2 board of directors and the Studio Defendants hold six of them. The remaining seats are held by  
3 representatives of the computer electronics industries and computer companies.

4 9. Disney Enterprises, Inc. is a Delaware corporation with its principal place of  
5 business in Los Angeles, California. It is engaged in the business of, among other things, making  
6 motion pictures. It is a member of the DVD CCA.

7 10. Paramount Pictures Corp. is a Delaware corporation with its principal place of  
8 business in Los Angeles, California. It is engaged in the business of, among other things, making  
9 motion pictures. It is a member of the DVD CCA.

10 11. Sony Pictures Entertainment, Inc. is a Delaware corporation with its principal place  
11 of business in Culver City, California. It is engaged in the business of, among other things,  
12 making motion pictures. It is a member of the DVD CCA.

13 12. Twentieth Century Fox Film Corp. is a Delaware corporation with its principal  
14 place of business in Los Angeles, California. It is engaged in the business of, among other things,  
15 making motion pictures. It is a member of the DVD CCA.

16 13. NBC Universal, Inc., is a Delaware corporation with its principal place of business  
17 in Universal City, California. It is engaged in the business of, among other things, making motion  
18 pictures. It is a member of the DVD CCA.

19 14. Warner Bros. Entertainment, Inc. is a Delaware corporation, with its principal place  
20 of business in Los Angeles, California. It is engaged in the business of, among other things,  
21 making motion pictures. It is a member of the DVD CCA.

22 15. Viacom, Inc. is a Delaware corporation, with its principal place of business in  
23 New York, New York. It is engaged in the business of, among other things, making motion  
24 pictures. It is a member of the DVD CCA.  
25  
26  
27  
28



**DECLARATORY RELIEF CLAIMS**

**NATURE OF CLAIMS FOR DECLARATORY RELIEF**

1  
2  
3 16. Plaintiffs' claims for declaratory relief arise as a result of a legal dispute between  
4 Plaintiffs and Defendants relating to two of Plaintiffs' innovative new products: a new software  
5 product known as Vegas and marketed as "RealDVD," and a yet-to-be-named product in the  
6 final stages of development that Plaintiffs herein refer to as the "New Platform" or "Facet." The  
7 two products are collectively referred to hereafter as "RealDVD." Vegas has a variety of  
8 different functions, including the playback of DVDs placed into a computer's DVD drive,  
9 looking up information about the DVD from Internet databases, providing links to various  
10 information websites relevant to the chosen DVD, and storing an image of the copy-protected  
11 DVD to a computer hard drive for safekeeping and later playback purposes. Facet has similar  
12 planned functionality.

13 17. When Vegas and Facet are used to make a personal copy of a DVD, they not only  
14 preserve the Content Scramble System ("CSS") encryption the Studio Defendants use to encrypt  
15 DVDs, but also incorporate an additional level of protection.

16 18. The Studio Defendants are members of the DVD Copy Control Association, a not-  
17 for-profit association that licenses the CSS technology to, among others, manufacturers of DVD  
18 hardware and software, such as RealNetworks, pursuant to a standard license agreement ("CSS  
19 License Agreement"). The Studio Defendants assert that the CSS License Agreement grants the  
20 Studio Defendants, as third-party beneficiaries, the right to enforce its terms against licensees, and  
21 in particular the right to prohibit the sale of Vegas and products with similar functionality such as  
22 Facet. *See* CSS License Agreement § 9.5.

23 19. Despite the fact that a California court concluded over a year ago that the same type  
24 of copying methodology employed by RealDVD do not violate the CSS License Agreement (*see*  
25 *DVD Copy Control Association, Inc. vs. Kaleidescape, Inc.*, Superior Court Santa Clara County  
26 (No. 1:04 CV 031829), Judgment dated Apr. 13, 2007), the Studio Defendants, on their own behalf  
27 and on behalf of the DVD CCA, nonetheless have asserted that products with functionality like that  
28 in the RealDVD products violate the CSS License Agreement and the anti-circumvention

1 provisions of the Digital Millennium Copyright Act (“DMCA”). On information and belief, the  
2 DVD CCA has asserted similarly.

3 20. Accordingly, there exists an actual and justiciable controversy between Plaintiffs  
4 and the Defendants relating to their respective rights and legal duties under the CSS License  
5 Agreement and the DMCA. Plaintiffs seek a judgment declaring, among other things, that the  
6 CSS License Agreement permits Plaintiffs to manufacture and offer for sale the RealDVD  
7 products and that the Plaintiffs do not violate the DMCA.

8 **FACTUAL ALLEGATIONS FOR DECLARATORY RELIEF CLAIMS**

9 **A. The CSS License Agreement and The DVD CCA**

10 21. The Studio Defendants sell DVD discs that contain movies, and such discs use the  
11 CSS technology to encrypt the content on the DVDs. Consequently, the content must be  
12 decrypted before the movie can be displayed. Thus, the manufacturers of hardware and software  
13 that permit DVD movies to be used (the consumer electronics and computer industries) must  
14 likewise have access to the CSS technology.

15 22. To facilitate their mutual interests in the use of the CSS technology, the motion  
16 picture, consumer electronics, and computer industries formed the DVD CCA. The DVD CCA  
17 licenses the CSS technology to, among others, manufacturers of devices and software used to  
18 decrypt images on DVDs pursuant to a standard form CSS License Agreement (a copy of which is  
19 attached hereto as Exhibit 1).

20 23. The CSS License Agreement imposes certain restrictions on its licensees, including  
21 the requirement that the licensees “comply with the version of the CSS Specifications which is in  
22 effect at the time such DVD Product is manufactured . . . .” CSS License Agreement § 4.2. The  
23 Studio Defendants assert that the CSS License Agreement grants them the right to enforce certain  
24 of its provisions, including Section 4.2. *See* CSS License Agreement § 9.5.

25 24. On or about August 13, 2007, RealNetworks signed the CSS License Agreement.  
26 It is thereby entitled to use the CSS technology under the terms of that Agreement.

27  
28



**FIRST CAUSE OF ACTION**

(Declaratory Relief under Contract Claim)

30. Plaintiffs reallege and incorporate by reference the allegations contained in Paragraphs 1 through 28 as if fully set forth herein.

31. There is an actual and justiciable controversy relating to the legal rights and duties of Plaintiffs and Defendants under the CSS License Agreement in that the Defendants have advised Plaintiffs that they believe that products with functionality like that in the RealDVD Products violate the CSS License Agreement. This controversy is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

32. Thus, a declaration of Plaintiffs' rights under the CSS License Agreement is necessary to protect Plaintiffs from uncertainty and insecurity, which is causing Plaintiffs injury by, among other things, damaging its goodwill and disrupting its business. Without the requested declaration of its rights, the Defendants will continue to jeopardize Plaintiffs' interests.

**SECOND CAUSE OF ACTION**

(Declaratory Relief under the Digital Millennium Copyright Act, 17 U.S.C. § 1201)

33. Plaintiffs reallege and incorporate by reference the allegations contained in Paragraphs 1 through 31 as if fully set forth herein.

34. RealNetworks is a licensee of CSS technology, and the RealDVD products were designed to conform to the CSS Specifications. As a result, the RealDVD products are authorized by the Defendants to utilize CSS technology to access the content of DVDs to which the Studio Defendants own the copyrights.

35. Neither Vegas nor Facet is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a copyrighted work, or that protects the right of a copyright owner. Rather, both of the RealDVD products ensure that the encryption protection in the original DVD is maintained and enhanced by incorporating an additional layer of protection at a level beyond that required by the CSS License Agreement.

36. Both the RealDVD products have commercially significant purposes and uses other than to circumvent a technological measure that effectively controls access to a copyrighted work,

1 or that protects the right of a copyright owner. By way of example only, the RealDVD products  
2 provide the owners of DVDs with the ability to save a personal copy of a DVD on a secure hard  
3 drive for private use, and protect the DVD owner against damage or loss of a DVD that he or she  
4 has obtained through legitimate means.

5 37. Neither Vegas nor Facet has been marketed for use in circumventing a  
6 technological measure that effectively controls access to a copyrighted work, or that protects the  
7 right of a copyright owner. Rather, Vegas has been marketed as licensed software that “saves a  
8 secure copy of a DVD to the hard drive without removing or altering the CSS encryption.” Facet  
9 will be marketed similarly upon release.

10 38. Plaintiffs request a judicial determination and declaration as to whether the  
11 RealDVD products violate the provisions of 17 U.S.C. § 1201. Such a judicial determination and  
12 declaration is necessary to protect Plaintiffs from uncertainty and insecurity, which is causing  
13 Plaintiffs injury by, among other things, damaging its goodwill and disrupting its business.  
14 Without the requested declaration of its rights, the Defendants will continue to jeopardize  
15 Plaintiffs’ interests.

## 16 **ANTITRUST CLAIMS**

### 17 **INTRODUCTION**

18 39. The Studio Defendants and the DVD CCA have sought to enjoin RealNetworks  
19 from distributing products that provide the technology to add features to DVD content by saving  
20 the content to a personal hard drive. RealNetworks’ technology products compete with products  
21 offered by the Studios. The position of the DVD CCA and the Studios about the CSS License  
22 Agreement was confirmed during the hearing on the preliminary injunction motion. They  
23 acknowledge that the CSS License Agreement results from collective action by the Studios  
24 through the DVD CCA to prohibit all copying to a hard drive unless the Studios jointly authorize  
25 the making of such a copy. Pursuant to their interpretation of the CSS License Agreement, each  
26 Studio has ceded its individual authority to authorize the use of its movie content through  
27 *individual* copyright licenses in favor of a *joint agreement* to grant or withhold the use of such  
28 content– the CSS License Agreement.

1           40.     If true, this is an antitrust violation for two reasons: (1) As described below,  
2 because of their interpretation of the CSS License Agreement, no individual Studio can authorize  
3 the use of its own content consistent with the claimed provisions of the CSS Agreement; (2) the  
4 CSS Agreement is being used to extend a legally granted monopoly over content into separate  
5 markets – to prevent competition from technologies that would allow a copy of content for fair  
6 use purposes. But the making of a copy of a Studio DVD is authorized fair use under the  
7 Copyright Act, so the Studios have no “authority” to grant or withhold with respect to that  
8 content. Nevertheless, the DVD CCA and the Studios claim that the CSS Agreement grants such  
9 authority, and that anyone seeking to compete with them in that separate market violates not only  
10 the CSS Agreement, but is also subject to criminal penalties under the Digital Millennium  
11 Copyright Act (“DMCA”).

12           41.     The average consumer owns over 75 DVDs. DVDs cost approximately \$10 -  
13 \$15. Thus the average household may have an investment of well over \$1,000 in its DVD  
14 collection.

15           42.     Market research shows that consumers’ main complaints about DVDs are  
16 twofold: (1) they get damaged; and (2) they get lost. It is common to open the DVD case of a  
17 favorite video only to find an empty slot; the wrong DVD in the case; or a DVD covered with  
18 scratches or gunk.

19           43.     In 2007, RealNetworks sought to meet strong consumer demand among DVD  
20 owners for technology that would enable them to save a secure copy of their DVDs to a hard  
21 drive for safekeeping, portability, easy retrieval, and later playback. It developed two  
22 innovative products – a software product code-named “Vegas” and a device code-named  
23 “Facet.” Both products will be referred to hereafter as “RealDVD.” RealDVD allows users to  
24 save and play a secure backup copy of the DVDs they own and to organize their favorite movies,  
25 TV shows, scenes and actors so that they are all just a click away.

26           44.     There were good reasons the Studio Defendants should have been excited about  
27 RealDVD: products that make DVDs easier for consumers to use make DVDs more valuable to  
28 their owners, and so are likely to increase the number of DVDs that consumers want to buy.

1 RealNetwork's innovative products thus stood to benefit everyone: consumers, who would get  
2 more value out of the DVDs they own; the Studio Defendants, who would sell more DVDs; and  
3 RealNetworks, from the sale of its new products.

4 45. Before RealNetworks released Vegas, RealNetworks approached the Studio  
5 Defendants to notify them of the product, and to explore mutual marketing opportunities.  
6 RealNetworks answered detailed questions about its product and the extensive safeguards it  
7 provided against piracy. Negotiations ensued with two of the Studios, Fox and Paramount.

8 46. Underlying the negotiations between RealNetworks and the Studio Defendants  
9 was the question of whether a consumer who had purchased a DVD had a fair-use right to make  
10 a secure copy of the DVD on his computer hard drive. RealNetworks believed then, as it does  
11 now, that a consumer who has purchased, for example, an *Iron Man* DVD, does not need further  
12 permission from Paramount to copy that DVD onto her hard drive so as to get the benefit of  
13 additional features that can only be provided by the saving to a hard drive. Those features  
14 include the protection of DVD content, the ability to automatically organize and search DVD  
15 content, bookmarking and parental control features, and the benefits of efficient portability for an  
16 individual's DVD collection. Nonetheless, RealNetworks was eager to negotiate these issues  
17 with the Studio Defendants, in the expectation it would be possible to reach marketing  
18 agreements that would benefit all of the parties.

19 47. Ultimately RealNetworks was unable to conclude a deal with any of the Studios.  
20 The Studio Defendants recognized that consumers would value the DVD playback and storage  
21 capability. The Studios, however, wanted their customers to pay substantial sums to the Studios  
22 themselves for this functionality. In essence, the Studio Defendants wanted to charge consumers  
23 who have already purchased the DVDs for their exercise of their fair-use rights to make a second  
24 backup copy.

25 48. Any individual Studio could have decided not to enter into an agreement with  
26 RealNetworks and to sue to prevent its customers from using RealDVD to make copies of that  
27 Studio's titles. Doing so individually, however, risked the possibility that another Studio might  
28 reach an agreement with RealNetworks to promote its titles in connection with the release of a



1 popular new product. The litigating Studio then would face what could be a legal and public  
2 relations nightmare.

3 49. The Studio Defendants agreed that they would claim that they cannot enter into  
4 individual agreements with RealNetworks – in other words, they agreed collectively not to deal  
5 with RealNetworks. So, for example, they claim that, because of the CSS Agreement,  
6 Paramount cannot grant a license to make an archival copy of its own *Iron Man* DVD without  
7 the permission of Fox, Disney, and the rest. This is a horizontal group boycott, and it is a  
8 horizontal group boycott even though the Studios in fact have no right to grant or withhold  
9 authority to make fair use copies and RealNetworks does not need their consent.

10 50. According to the Studios, this boycott is required by the terms of a license issued  
11 through an entity that they effectively control called the DVD CCA. The DVD CCA was created  
12 to license the encryption technology (CSS) that any company needs in order to make products to  
13 play a DVD. According to the Studios, under the CSS license, unless amended (which requires  
14 their collective approval through DVD CCA), they are prevented from individually granting  
15 RealNetworks a license that would make clear that customers of any particular Studio can make  
16 an archival copy of that Studio's DVDs (as long as the customer owns the DVD).

17 51. Testimony at the preliminary injunction hearing confirmed that the Studios  
18 entered into this collective agreement that, according to their interpretation, prohibits any  
19 individual studio, without the action of the group, from authorizing any copies of their content  
20 (for fair use or otherwise). Ms. King, a former Studio lawyer characterized by the Studios'  
21 outside counsel as "a framer" of the CSS license (Tr. 19:9-17), unequivocally testified that the  
22 motion picture studios got together as a group to determine the terms of the CSS license. (Tr.  
23 74:1-12; 76:14-19; 83:14-84:6; 110:19-111:10). Their concerted action is illegal because they  
24 agreed that there would be "no copies at all" of each individual Studio's content made without  
25 the authority of the group acting in concert. According to Ms. King, this agreement is  
26 memorialized in the CSS License Agreement. (Tr. 74:1-12; 79:22-80:3). According to Ms.  
27 King, the right of the Studios to authorize the use of their content flows through the CSS License  
28

1 Agreement, which allows only what the Studios “authorized could be done.” (Tr. 87:16-88:4;  
2 98:10-23; 111:22-112:5).

3 52. Testimony from the expert from the DVD CCA, Dr. Kelly, further made clear that  
4 the Studios and the DVD CCA intend the CSS agreement to prohibit any copies of DVD content  
5 to a hard drive without the authority of the Studios. (Tr. 152:20-153:8). Dr. Kelly’s theory is  
6 that the CSS agreement, by its terms, requires that a physical DVD disc be in a drive during  
7 playback. (Tr. 149:10-23). According to this interpretation, no individual studio could possibly  
8 give authority to create a product allowing for the copying of the individual studio’s content  
9 without having that product run afoul of the group CSS Agreement. In other words, in order for  
10 an individual studio to grant such authority, the group acting as a whole through the DVD CCA  
11 would need to amend their agreement. The CSS Agreement, which is a product of the joint  
12 conduct of the DVD CCA and the Studios, therefore memorializes the illegal horizontal  
13 agreement to boycott any potential competitor.

14 53. Consistent with their agreement, the Studios have never authorized anyone to  
15 make a playable copy of their content. (Tr. 100:14-20). Mr. Dunn, speaking for 20<sup>th</sup> Century  
16 Fox Entertainment, confirmed the same thing: “The Studios have never licensed any third party  
17 to offer a lawful product that would allow the copying of DVDs onto hard drives (and to my  
18 understanding, the encryption technology we use on our DVDs does not even permit for such a  
19 license).” (Dunn Decl., ¶ 28.)

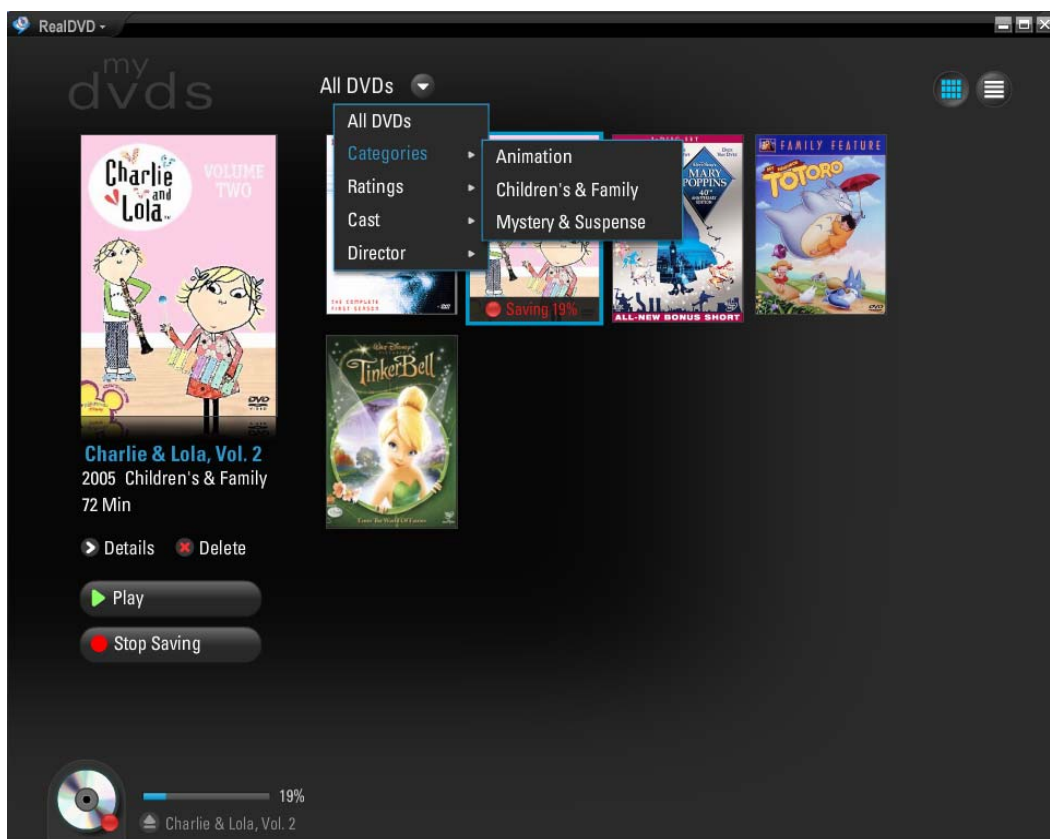
20 54. Consumers are directly harmed by the Studio Defendants’ and the DVD CCA’s  
21 conduct. The risk the Studio Defendants faced – that some one of them would do a deal with  
22 RealNetworks or any other of their potential competitors – is the risk created by a competitive  
23 marketplace. Consumers would have obtained a new technology to gain more value from their  
24 DVDs, without having to pay again for a backup copy of the DVDs they had already purchased.  
25 The Studio Defendants decided to short-circuit this outcome so that they could appropriate all of  
26 the extra value themselves, through the means of a group boycott. The DVD CCA is the  
27 instrumentality that they used to effectuate the boycott. A group boycott is, indeed, a very  
28

1 effective means of achieving this objective. Not coincidentally, that is also why it is per se  
 2 illegal under the antitrust laws.

3 **NATURE OF ANTITRUST CLAIMS**

4 **A. The RealDVD Products**

5 55. The RealDVD products give consumers the ability to save DVDs they own to  
 6 their computers or, in the case of Facet, a separate hardware box, where the DVDs are  
 7 catalogued in a library that displays covers of the DVDs so that they are easily retrievable for  
 8 playback. A user's screen in the Vegas product will look like this:



23 56. Once the DVDs are stored in RealDVD, they can be retrieved for playback at the  
 24 user's convenience, without having to search for the physical copy of the DVD.

25 57. RealDVD offers many features that consumers want, including:

- 26
- 27
- 28
- The ability to keep consumers' DVDs safe, without scratches, gunk, skips, blips, or lost titles.
  - Through the Vegas product, the ability to take an owner's DVD collection on the road to view from a hard drive. Many consumers watch the DVDs they

1 own from their personal computer on airplanes and during vacations, but do  
2 not want to carry along multiple DVDs from their collection.

- 3 • RealDVD remembers where the consumer is in the movie, so he can stop, shut  
4 down and come back later without losing his spot.
- 5 • RealDVD provides additional features, such as detailed plot synopses and cast  
6 lists for the movies; parental controls; and the ability to browse the collection  
7 by cover art, genre, title, rating, or actor.

8 58. The product designers at RealNetworks saw the potential demand for products  
9 like RealDVD based partly on the popularity of a product from a company named Kaleidescape.  
10 As described on the Kaleidescape website, “The Kaleidescape System simplifies the way you  
11 collect, manage and enjoy movies and music. Once your personal entertainment collection is  
12 stored on the Kaleidescape System's fault-tolerant Servers, you can say goodbye to DVD and CD  
13 clutter and the frustration of storing and organizing your movies and music.”

14 59. With a price tag that can reach over \$ 10,000, however, Kaleidescape is not  
15 accessible to the general public. Kaleidescape makes the point quite well: “the Kaleidescape  
16 System, is an entertainment server that has changed the way movies and music are collected and  
17 enjoyed in a home, yacht or private jet.” See <http://www.kaleidescape.com/news/>.

18 60. The DVD CCA sued Kaleidescape on the ground that Kaleidescape was barred by  
19 the terms of its license agreement to DVD encryption technology (the CSS license) to provide  
20 consumers with technology that would allow them to make personal copies of the DVDs they  
21 own.

22 61. The DVD CCA lost that case. Thereafter, RealNetworks determined that it could  
23 make products that provided this capability while complying with the CSS agreement and the  
24 law.

25 62. RealNetworks wanted to make a product with similar functionality that could be  
26 used by the average DVD customer. The price tag for the Vegas software, for example, is  
27 \$50.00 (and was offered at an introductory price of \$29.99).  
28

1           **B.       The Studio Defendants Seek to Maintain the Profits from the Fair Use Copy**

2           63.       The Studio Defendants themselves have been attempting to develop a product that  
3 would allow consumers to make a copy of the DVDs they purchase for use on a personal  
4 computer or portable video player like an iPod. The Studio Defendants call this “digital copy”,  
5 “managed copy,” and “second session copy.” “Digital copy” is a separate disc that allows for the  
6 making of a copy of the content on a DVD onto a consumer’s computer hard drive. The copy  
7 may be made directly from a DVD or could be delivered over the Internet as a download. Upon  
8 information and belief, one or more of the Studio Defendants have approached a company called  
9 Sonic to help them build a product with functionality similar to RealDVD.

10          64.       The critical difference between RealDVD and the Studios’ plan for “digital” and  
11 “managed copy” is that the Studios intend to charge DVD purchasers an additional sum for the  
12 “managed copy” of each and every DVD they have purchased. Having already purchased the  
13 digital content on their DVDs, however, DVD owners have the fair-use right to make a backup  
14 copy for these purposes without buying the content a second time. In fact, average consumers  
15 have over 75 DVDs that they have already purchased and for which they already own the rights  
16 to make a fair use copy without making an additional payment to the Studios. The Studio  
17 Defendants are motivated by their own financial gain. Indeed, the longer that they are able to  
18 hinder the development and release of products that provide consumers with the ability to make  
19 fair-use copies of DVDs that they own, the Studios’ own ability to market such a product is  
20 aided. The illegal scheme thus delays competitors while leaving the Studio Defendants free to  
21 market their own products and to charge consumers for the fair-use copy that the law already  
22 gives consumers the right to make.

23          65.       Consumers are harmed by this conduct. To start, charging consumers to exercise  
24 their fair-use rights, as the Studio Defendants would like to do, reduces the value of the DVDs  
25 consumers already own or would buy and improperly extends the narrow exclusivity that the  
26 copyright laws provide to a content owner (here, the Studio Defendants). The effect is the same  
27 as if the Studios had agreed to increase the prices of the DVDs themselves. RealNetwork’s  
28

1 products threaten the Studio Defendants' attempts to monetize the non-infringing digital copies  
2 consumers already are entitled to create.

3 66. But whether or not a consumer has a fair-use right to make backup copies of the  
4 DVDs they already have purchased, the Studios' collective agreement not to negotiate individual  
5 licenses for their content with RealNetworks or any other potential competitor is nothing more  
6 than an illegal scheme between horizontal competitors to eliminate a competitive threat and to  
7 charge higher prices. The harm to consumers from such a scheme is obvious—they will pay  
8 higher prices for the privilege of making digital copies of their DVDs.

9 67. The Studio Defendants' and the DVD CCA's unlawful conduct ensures that –  
10 until they are stopped by a court – the Studios will be free from competition in the market for  
11 technology that enables a consumer to make a secure backup copy of a DVD that she already  
12 owns. Competition and consumers alike will suffer as a result of this unlawful conduct.

### 13 **C. RealDVD's Protection Against Unauthorized Copying**

14 68. RealNetworks has put into place significant protections against unauthorized  
15 copying, including:

- 16 • RealDVD stores DVD content securely on a hard drive in the original CSS  
17 encrypted form.
- 18 • RealDVD adds a layer of security to the CSS protection by further encrypting  
19 the CSS encrypted content and the keys to unlock the content with AES  
20 encryption. AES encryption is a quintillion times more secure than the CSS  
21 encryption. It is the encryption system used by the U.S. Government for  
22 classified information.
- 23 • RealDVD is a “closed system” that does not allow DVD content to be sent  
24 through a network or uploaded to an Internet site and viewed by any other  
25 person. The backup copy made by RealDVD cannot be copied in playable  
26 form to any other hard drive or other device as a result of the AES encryption.
- 27 • The backup copy made by RealDVD cannot be played from any storage  
28 device other than the storage device onto which it was originally copied. It is  
impossible to transfer playable DVD content onto a device like an iPod or to  
“burn” a new playable DVD disc using RealDVD. RealDVD cannot be used  
to create pirate or counterfeit DVDs.
- When Facet saves a DVD to its hard drive, that DVD is locked to that hard  
drive and may only played on the Facet machine that saved the copy.

- 1 • Facet does not allow a user to do anything with the saved DVD other than  
2 play it. It cannot be sent over the Internet or even over a home network.
- 3 • Vegas prevents making a copy of the DVDs that are on the computer hard  
4 drive. A user can make a copy only from the physical DVD. The user cannot  
5 then make a copy of the copy.
- 6 • Vegas allows the playback of the saved DVD on only five registered playback  
7 devices. The intended and probable use is for sharing of a single archival  
8 hard drive among a family's multiple computers (*e.g.*, within a house or on  
9 vacation). The playback is accomplished by taking the single physical hard  
10 drive on which the DVDs are saved and plugging it in one at a time into one  
11 of five registered devices. In order to play the DVDs, the hard drive needs to  
12 be present. Thus with the removable hard drive, a family can view their saved  
13 DVDs on television (so long as it is attached to hard drive on which the saved  
14 DVDs are located); a laptop in the bedroom if the television is being used by  
15 other members of the family; a laptop during travel; or a personal computer  
16 located, for example, in the kitchen.

12 **D. The Studio Defendants' Rejection of Efforts to Implement Further Technical**  
13 **Controls Against Unauthorized Copying**

14 69. Before RealNetworks released Vegas, it approached the Studio Defendants to  
15 notify them of the product, to answer any questions they had regarding the product's piracy  
16 safeguards, and to explore mutual marketing opportunities.

17 70. During these talks, two of the Studios, Fox and Paramount, expressed concern  
18 over the potential problem of people renting DVDs, copying them, and then returning them – so-  
19 called “rent, rip, & return.” The Studios do not currently mark rental DVDs in any way that  
20 would make it possible for RealDVD to distinguish them from purchased DVDs.

21 71. During their talks with Real, the Studios acknowledged that it was solely within  
22 their power to prevent “rent rip & return” by marking rental DVDs with, for instance, certain  
23 watermarks. The Studios currently mark their rental DVDs in Europe and could do so in the  
24 United States as well. RealNetworks indicated that it would do anything it could to ensure that  
25 the RealDVD product could not be used to save DVDs with such markings.

26 72. The Studios also discussed the concept of providing a unique mark for each DVD  
27 sold, so that they could track how many copies were made of that DVD. Again, RealNetworks  
28



1 agreed that it would support any industry standard way to prevent its product from being used to  
2 save DVDs that had been copied too many times.

3 73. RealNetworks delayed its long-planned and scheduled product release to try to  
4 reach an accommodation with the Studios to address their concerns.

5 **E. The Studio Defendants' Decision to Engage in an Illegal Cartel**

6 74. The negotiations for a potential solution and a business deal went the furthest with  
7 Paramount. RealNetworks and Paramount exchanged numerous term sheets, and had even  
8 agreed upon preliminary dollar amounts to enter into a marketing arrangement whereby  
9 Paramount would include Vegas on its DVDs and receive some payment in return. At the last  
10 minute, however, Paramount indicated that it was not prepared to break with the Studio cartel  
11 without substantial compensation for doing so. The compensation demanded by Paramount was  
12 an exorbitant sum, not at all tethered to the business value of the deal under negotiation.

13 75. The importance of a deal with one Studio, such as Paramount, cannot be  
14 overstated. Whether or not there is a fair-use right for consumers to make secure backup copies  
15 of DVDs that they own, any Studio should have the unilateral ability to agree to allow its  
16 customers to use RealNetworks to make such copies. In fact, that is precisely what  
17 RealNetworks was attempting to procure, and what some of the Studio Defendants were  
18 involved in negotiating, so as to avoid the legal controversy over infringement versus fair use. If  
19 one major Studio had entered into a deal with Real, legitimizing the product and allowing the  
20 product to be used to copy that Studio's content, it would have made it difficult for the rest of the  
21 Studios to charge consumers supra-competitive prices for their own "managed copy" products,  
22 and so eventually many would likely have entered into their own agreements with Real. Such a  
23 deal also would have demonstrated the clear lack of irreparable harm required for an injunction.

24 76. Because of the significance of one Studio entering into a deal with Real, the  
25 Studios decided that they could not break ranks. Instead, hiding under the umbrella of an  
26 organization that they control – the DVD CCA – the Studio Defendants jointly campaigned to  
27 eliminate the possibility of any entity other than themselves competing in this market. They also  
28 agreed collectively to refuse to enter into individual licenses with Real.

1                   **1. The Studio Defendants' and the DVD CCA's Use of the CSS License**  
2                   **Agreement to Prevent Competition**

3           77. Defendant DVD CCA is a joint venture trade association. Its member movie  
4 Studios compete against one another and others in the industry to provide content to users in  
5 various formats. As a joint venture of horizontal competitors, the DVD CCA must have  
6 circumscribed powers necessary to achieving a lawful purpose.

7           78. The stated purpose of the DVD CCA is to license the Content Scramble System  
8 (CSS) to manufacturers of DVD hardware, discs and related products. As described by  
9 Defendant DVD CCA, "CSS prevents movies from being *illegally* duplicated, protecting the  
10 intellectual property of the manufacturers, producers and writers from *theft*." (Emphasis added).  
11 Indeed, the DVD CCA has represented to the United States government in connection with its  
12 application under the National Cooperative Research and Production Act (NCRPA) that "[t]he  
13 nature and objectives of the venture are to provide an encryption technology designed to prevent  
14 unlawful or unauthorized copying by encrypting digital files that can be decrypted only on  
15 licensed equipment. DVD CCA also intends to research, evaluate, adopt and license related  
16 technologies designed to protect CSS against unauthorized or unlawful copying and to prevent  
17 the unauthorized or unlawful copying and playback of DVD discs." (Fed. Reg. Vol. 66, No. 150,  
18 at 40729 (8/3/2001).)

19           79. The DVD owner's ability to save his/her *own* DVDs for storage and later  
20 playback, however, is neither illegal duplication nor theft, but the exercise of his/her legitimate  
21 fair-use rights with respect to a product already purchased.

22           80. Whether or not the DVD owner already has this fair-use right, a Studio Defendant  
23 could license the ability to make such copies. Achieving any limited legitimate purpose of the  
24 DVD CCA does not require a licensing agreement that prohibits individual Studios from  
25 granting licenses to copy their content from DVDs. Yet this is exactly what the DVD CCA and  
26 the Studio Defendants claim that the CSS License prohibits. As such, the legitimate purpose of  
27 the DVD CCA has been subverted to serve as a means through which the Studio Defendants act  
28

1 as, and enforce, a cartel with respect to the licensing of their content by different, lawful copying  
2 technologies.

3 81. Indeed, the CSS License specifically contemplates with respect to “secure  
4 managed recording” (essentially, burn-to-DVD), another type of copying technology, that  
5 collective action is not required for a license to a given Studio’s content (assuming such a license  
6 is necessary at all). The Studios’ approach to “secure managed recording” illustrates that the  
7 terms under which a particular movie or television program can be licensed for the creation of a  
8 digital copy is (at most) a matter for negotiation with the individual Studio.

9 82. Nonetheless, the DVD CCA and the Studio Defendants claim that the CSS  
10 Agreement prevents the Studios from entering into individual licenses granting the right to make  
11 digital copies of DVDs previously purchased by customers. To try to enforce the illegal and  
12 unjustified terms in the CSS License Agreement, they demand that in order to license the CSS  
13 technology, RealNetworks and other potential competitors to the Studio Defendants must agree  
14 not to compete in the provision of technology that would enable DVD owners to create and store  
15 a secure digital copy of DVDs that they own.

16 83. If the DVD CCA and the Studio Defendants are right in their collective  
17 interpretation of the CSS License Agreement — that the agreement conditions access to the CSS  
18 technology on a promise not to enable DVD owners to create and store a secure copy of DVDs  
19 that they own, except upon terms collectively dictated by the Studio Defendants and the DVD  
20 CCA — then the agreement itself is illegal and would have been illegal since its inception. It  
21 would simply function as the vehicle by which the Studio Defendants unlawfully extend the  
22 narrow monopoly afforded to them by the copyright laws.

23 84. If the Studio Defendants and the DVD CCA are wrong in their interpretation of  
24 the CSS License, then their attempt to use the License to impose post-hoc terms that were not  
25 included in the License amounts to an illegal group boycott.

26 85. The Noerr Pennington doctrine does not insulate their collective agreement to  
27 interpret the CSS License in this manner. It is not the litigation through which the Studio  
28 Defendants and the DVD CCA seek to persuade a court to adopt their interpretation of the CSS

1 License Agreement that has the anti-competitive effect. Rather, it is the interpretation of the  
2 Agreement in the manner advocated by the Studio Defendants and the DVD CCA that causes the  
3 harm, by turning the CSS Agreement into an exclusionary agreement that requires anyone who  
4 executes it to give up the right to compete with the Studio Defendants. It is thus the CSS License  
5 Agreement itself, or the Studio Defendants' and the DVD CCA's collective interpretation of it,  
6 that violates Section 1. Litigation is merely a manifestation of their illegal agreement.

## 7 **2. The Studios' Collective Refusal to Deal**

8 86. As part of their collective response to RealNetworks, the Studio Defendants have  
9 also agreed not to enter into individual business deals with RealNetworks regarding the  
10 marketing or release of RealNetwork's products.

11 87. When RealNetworks came close to such a deal with Paramount, Paramount at the  
12 last minute indicated that it would require a substantial payment to break ranks and do a deal  
13 with RealNetworks individually. There is no place under the antitrust laws of the United States  
14 for competitors to agree with one another that they will not enter into individual business deals  
15 with another potential competitor, for fear that such a deal would undermine their collective  
16 position in the Courts or in the marketplace. Such an agreement constitutes a group boycott, and  
17 is illegal under Section 1 of the Sherman Act.

18 88. The collective agreement is further evidenced by the fact that none of the Studios  
19 would individually enter into a tolling agreement with RealNetworks, allowing for time to  
20 negotiate before litigation was commenced. Instead, the Studios insisted on a group agreement.  
21 There is no place under the antitrust laws of the United States for competitors to agree with one  
22 another that they will only negotiate with a potential competitor as a group. Such an agreement  
23 constitutes a group boycott, and is illegal under Section 1 of the Sherman Act.

24 89. There is nothing about the CSS technology that requires the Studio Defendants to  
25 act collectively with respect to the terms on which they will grant to RealNetworks the additional  
26 rights they claim are required for RealNetworks to enable consumers to make a digital backup  
27 copy of a DVD purchased from a particular studio.

28

1           90.     Indeed, some of the Studio Defendants already independently have begun to  
2 compete with RealNetworks by selling “new” (and more expensive) versions of DVDs that  
3 include a second disc from which the consumer can copy the movie onto a computer’s hard  
4 drive. The price the Studios can charge for these discs, however, would drop quickly if one or  
5 more of the other Studios negotiated a license with RealNetworks that would confirm the right of  
6 consumers to make digital copies of that Studios’ movies without having to pay an exorbitant  
7 sum to buy a second disc.

8           **F.     Harm to Consumers from the Studio Defendants’ Illegal Cartel**

9           91.     In making these agreements, the Studio Defendants are motivated by their own  
10 financial gain. There are two distinct ways, both illegal, in which the Studios hope to profit from  
11 their illegal scheme. Consumers will be harmed in either event.

12           92.     To begin with, despite the fact that their customers have a fair-use right to make  
13 backup copies of the DVDs they already have purchased, the Studios would like to force DVD  
14 owners to pay a second time to obtain that copy. In other words, the Studios want to charge  
15 consumers to exercise their fair-use rights. If the Studio Defendants and the DVD CCA succeed  
16 in imposing this illegal surcharge, they will have reduced the value of the DVDs consumers  
17 already own or would buy. Consumers will get less value for the same price.

18           93.     The Studio Defendants perceive the new products developed by RealNetworks as  
19 a significant threat to their ability to monetize the non-infringing digital copies consumers  
20 already are entitled to create, a stream of revenue to which the Studio Defendants purport they  
21 are entitled but as to which the copyright laws, in fact, give them no right.

22           94.     Moreover, whether or not customers have a fair-use right to make backup copies  
23 of the DVDs they already have purchased, the Studios’ collective agreement not to negotiate  
24 individual licenses for their content with RealNetworks, under the guise that the CSS Agreement  
25 would preclude such deals anyway, is nothing more than an illegal price fixing scheme between  
26 horizontal competitors. The harm to consumers from such a scheme is obvious—they will pay  
27 higher prices for the privilege of making digital copies of their DVDs.

28

1 95. By their illegal agreement, the Studio Defendants have ensured that – unless a  
2 court intervenes – they will face *no* competition in the market for technology that enables a  
3 consumer to make a secure backup copy of a DVD that she already owns. With no competitors  
4 to challenge them, the Studios will face less pressure to make the technology available to  
5 consumers sooner rather than later, or to develop consumer-friendly features. Competition and  
6 consumers alike will suffer as a result of this unlawful conduct.

7 **FACTUAL ALLEGATIONS FOR ANTITRUST CLAIMS**

8 ***RealNetwork's CSS License and the Introduction of the RealDVD Product***

9 96. RealNetworks entered into a CSS License Agreement with DVD CCA on or  
10 about August 13, 2007, for the purpose of obtaining the technology needed for its RealDVD  
11 product to play back encrypted DVD content on personal computers. RealNetworks is therefore  
12 entitled to use the CSS technology under the terms of that Agreement.

13 97. In September, 2008, RealNetworks informed the DVD CCA and the Studio  
14 Defendants that its RealDVD technology would be released to the public on September 30, 2008.  
15 After unsuccessful attempts to resolve the ensuing dispute between RealNetworks and the DVD  
16 CCA and the Studio Defendants, described above, RealNetworks sued both the DVD CCA and  
17 the Studio Defendants in this Court on September 30, 2008. RealNetwork's complaint seeks a  
18 declaration that RealNetworks has neither breached the terms of its CSS License nor engaged in  
19 conduct in violation of the DMCA. At the same time, in the Central District of California, the  
20 Studio Defendants filed their own Complaint, together with an *ex parte* application for a  
21 temporary restraining order and an order to show cause why a preliminary injunction should not  
22 issue to prevent RealNetworks from marketing or selling its RealDVD product.

23 98. Following transfer of the Studio Defendants' Complaint and pending TRO motion  
24 to the Northern District of California, this Court granted the Studio Defendants' renewed request  
25 for a temporary restraining order barring the sale of RealDVD on October 7, 2008. On  
26 November 10, 2008, the DVD CCA filed Counterclaims against RealNetworks, including a  
27 claim that RealNetworks has breached the CSS License Agreement by developing and  
28 distributing RealDVD, accompanied by DVD CCA's own motion for preliminary injunction.

1 RealNetworks moved for and was granted leave to amend its Complaint to include Facet on  
2 December 23, 2008. The DVD CCA has subsequently amended its Counterclaims to allege that  
3 RealNetworks' development of Facet also constitutes a breach of the CSS License Agreement.

4 ***The Relevant Market***

5 99. The relevant product market is the provision of technology that enables  
6 consumers to (a) create or otherwise obtain digital copies of movies and TV shows that they own  
7 on DVDs and (b) store and manage those copies electronically (e.g., on a hard drive) for  
8 subsequent playback. Only firms that enable consumers to obtain digital copies of movies and  
9 TV shows that they own and to store them electronically for subsequent playback have the  
10 ability to take significant amounts of business away from each other. A hypothetical monopolist  
11 of such technology would be able profitably to impose a small but significant and nontransitory  
12 increase in price. Manufacturers of conventional DVD players do not compete in this market, in  
13 that they do not constrain pricing by firms in the relevant market, but they do lose sales and  
14 income to firms that succeed in the relevant market.

15 100. The relevant geographic market is the United States.

16 101. The principal competitors in the relevant market are RealNetworks, AMX,  
17 Telestream, Kaleidescape, and the Studio Defendants.

18 102. As elaborated in the declaration of Fox's Michael Dunn, the Studios are actively  
19 working on a number of products designed to provide consumers with the ability to obtain a  
20 second digital copy of DVDs that they purchase. The Studio Defendants acknowledge that  
21 RealNetworks is a competitor to at least two of these products: "digital copy," which is already  
22 available for many movie titles, and so-called "managed copy" — which the Studios are working  
23 to define in the context of a multi-industry agreement.

24 103. Digital copy is a product that the Studios are marketing where a DVD is sold with  
25 an additional "digital copy" version of the content (a second disc), where the second disc can be  
26 copied onto the consumer's computer hard drive (without CSS encryption). As Mr. Dunn  
27 declares: "'Digital Copy' versions of DVD movies are sold – at a higher cost than the regular  
28 version of the same movie – with an extra disc containing additional features. One of the



1 features of the second disc is the ability to place it in a computer's DVD drive and copy the  
2 movie to a computer's hard drive." Mr. Dunn continues: "*Digital Copy is particularly relevant*  
3 *because it allows consumers to purchase from the Studios that which RealDVD is trying to sell*  
4 *for its own benefit.*" (Dunn Decl., para 17.) The cost for this "second disc"? Roughly \$4.00 for  
5 each individual disc.

6 104. Managed copy is simply the ability to make a copy of the content on a standard  
7 definition DVD (as opposed to high-definition Blu-ray discs) onto a consumer's computer hard  
8 drive. As Mr. Dunn again declares: "This capability, referred to (sic) 'Managed Copy' is, once  
9 again, similar to RealDVD's functionality, in that it allows consumers to have content both on a  
10 DVD and on their computer's hard drive. The critical difference is that (a) Managed Copy will  
11 be authorized by the content owners and (b) *it will allow the content owners to capture the extra*  
12 *value that it brings to the consumer.*" (Dunn Decl., para 19.)

13 105. Mr. Dunn also mentions "Burn-to-DVD," which is another technology that will  
14 allow a consumer to create a DVD after purchasing a download of a movie or television show.  
15 (Dunn Decl., para. 18.) The DVD CCA recently approved an amendment to the CSS  
16 Specifications that permits each Studio to decide independently whether and whom it will  
17 authorize to enable the creation of such DVDs.

#### 18 ***The Studio Defendants' Market Power***

19 106. The Studio Defendants comprise the largest and most powerful collection of  
20 motion picture companies in the United States and compete with each other in the market for  
21 motion picture content. The audio-visual works that the Studio Defendants create and own make  
22 up a predominate percentage of the content suitable for family viewing available to consumers  
23 on DVD. These competing Studio Defendants dominate the market for copyrighted motion  
24 picture content, which is an essential input into not only the RealDVD and the Facet products,  
25 but also other products that have similar functionality to RealNetwork's products. The Studio  
26 Defendants thus not only compete in the relevant market but also collectively control an element  
27 essential to effective competition in the relevant market.  
28

1 ***The Group Boycott: Refusing to Deal with Real***

2 107. The Studio Defendants have entered into a “contract, combination, or  
3 conspiracy,” within the meaning of Section 1, among the Studio Defendants. This is so in two  
4 respects.

5 108. First, should the DVD CCA and Studio Defendants’ interpretation of the CSS  
6 License Agreement prevail, then the contract stands as a binding (until declared unlawful)  
7 agreement among them to boycott RealNetworks until RealNetworks assents to their  
8 collectively-imposed terms. If the DVD CCA and the Studio Defendants are incorrect in their  
9 interpretation, as RealNetworks submits, their joint attempt to block competition in the market  
10 for these “new digital products” by collectively refusing to deal with RealNetworks similarly  
11 violates Section 1.

12 109. Second, as explained in paragraphs 31-38, *supra*, one Studio Defendant has  
13 represented to RealNetworks that there is an agreement, upon which the Studio Defendants have  
14 acted, not to enter into individual business deals with RealNetworks.

15 ***The Group Boycott Has Harmed RealNetworks***

16 110. RealNetworks initially planned to launch Vegas upon the announcement of the  
17 product at a technology conference on September 8, 2008. RealNetworks made an ambitious  
18 and expensive public relations and advertising effort to prepare for the initial launch. When  
19 RealNetworks delayed the launch of Vegas to September 30, 2008 while it attempted to address  
20 the Studio Defendants’ concerns regarding the product, RealNetworks attempted to recreate as  
21 much as possible the initial public interest that surrounded the product at the time of the planned  
22 initial September 8 launch. However, despite RealNetwork’s efforts, many of the publications  
23 that had already generated press regarding Vegas were not willing to run second articles on the  
24 product.

25 111. In the event that DVD CCA’s and the Studio Defendants’ efforts to keep its  
26 products from the market are unsuccessful, RealNetworks will most certainly not be able to  
27 successfully execute a “third” publicly acclaimed launch of RealDVD after having been tainted  
28 with the mislabel of an illegal product following two aborted launches.



1 116. Moreover, whether or not consumers have a fair-use right to make back up copies  
2 of DVDs they already have purchased, by agreeing not to negotiate in good faith individually  
3 with RealNetworks (while claiming that they are prohibited from doing so by the CSS  
4 Agreement), the Studio Defendants have effectively agreed to fix the price at which they will  
5 license their content. As a consequence, consumers will pay more than they otherwise would  
6 have to make digital copies of their DVDs.

7 117. Second, by using the DVD CCA to impede or thwart the efforts of firms like  
8 RealNetworks to develop and distribute products that would permit them to compete in the  
9 relevant market, the Studio Defendants have been and will continue to be able to retard the pace  
10 at which such products become available to consumers, as well as the features that they offer to  
11 consumers. The concerted actions of the Studio Defendants and the DVD CCA alleged herein  
12 directly and intentionally impede the introduction of viable, lawful new technologies. Indeed,  
13 the Studio Defendants' assertions about how quickly consumers would adopt RealDVD  
14 illustrates the adverse effect that DVD CCA's and the Studio Defendants' conduct has had and  
15 will continue to have in slowing the introduction of technology for which there is substantial  
16 consumer demand.

### 17 **THIRD CAUSE OF ACTION**

#### 18 ***Group Boycott in Violation of Section 1 of the Sherman Act***

##### 19 ***(Construction of CSS License Agreement)***

20 118. RealNetworks incorporates the allegations of paragraphs 1 through 79 as if fully  
21 set forth herein.

22 119. Under the DVD CCA's and Studio Defendants' interpretation of the CSS License  
23 Agreement, any hardware or software manufacturer wishing to provide technology capable of  
24 playing back copyrighted audio-visual works owned by the Studio Defendants is required at the  
25 same time to agree to forebear from competing in the relevant market for technology that enables  
26 consumers to (a) create or otherwise obtain digital copies of movies and TV shows that they own  
27 on DVDs and (b) store and manage those copies electronically (e.g., on a hard drive) for  
28 subsequent playback. The technology that makes up the relevant market permits consumers to

1 engage in non-infringing conduct relating to the Studio Defendants' copyrighted audio-visual  
2 works. As such, the DVD CCA and Studio Defendants have no basis in copyright law to  
3 exclude competition in this market. Moreover, even if licenses for digital copying were  
4 necessary, the relevant copyrights relating to the underlying content are held by the individual  
5 Studios, and there is no lawful basis for the Studio Defendants to negotiate for such licenses only  
6 on collective terms.

7 120. The Defendants do not further any legitimate pro-competitive purpose by  
8 adhering to their agreement. In fact, the DVD CCA and the co-conspiring Studio Defendants  
9 entered into the collective boycott, and acted in furtherance of their conspiracy, with the intent to  
10 harm competition for the provision of technology in the relevant market.

11 121. The DVD CCA's and the co-conspiring Studio Defendants' collective boycott and  
12 conduct in furtherance of their conspiracy has had a direct and substantial effect on interstate  
13 trade and commerce.

14 122. RealDVD competes with products currently offered by the Studio Defendants, as  
15 well as with products that the Studio Defendants have stated they intend to offer in the near  
16 future. Absent their unlawful agreement, the co-conspiring Studio Defendants would otherwise  
17 have competed directly with one another, and with other Studios and technology providers like  
18 RealNetworks, to develop technology in the relevant market.

19 123. The DVD CCA and its co-conspirators' unlawful contract, combination,  
20 conspiracy and agreement in unreasonable restraint of interstate trade and commerce constitutes  
21 a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

22 124. The DVD CCA and its co-conspirators' unlawful contract, combination,  
23 conspiracy and agreement is an unreasonable restraint of interstate trade and commerce and  
24 therefore also violates Section 1 of the Sherman Act, 15 U.S.C. § 1, under the Rule of Reason.  
25 The market for technology that enables consumers to (a) create or otherwise obtain digital copies  
26 of movies and TV shows that they own on DVDs and (b) store and manage those copies  
27 electronically (e.g., on a hard drive) for subsequent playback, is a relevant product market within  
28 the meaning of the antitrust laws. The relevant geographic market is the United States. The co-

1 conspiring Studio Defendants control an element essential to effective competition in the  
2 relevant market and are using the control that they exert over that element to inhibit  
3 RealNetwork's competition with them in the relevant market.

4 125. The anticompetitive and exclusionary effects of the DVD CCA and the co-  
5 conspiring Studio Defendants' unlawful collective boycott have caused:

6 (a) A significant reduction in consumer welfare, by curtailing the ability of  
7 consumers to play back and enjoy DVDs containing movies or TV shows those consumers  
8 own or would buy. The value of those DVDs is thereby reduced, amounting to an increase  
9 in price, and a reduction of competition in the relevant market.

10  
11 (b) The retardation of innovation in the relevant market. As construed by the  
12 Studio Defendants and the DVD CCA, and if that construction is adopted by this Court, the  
13 CSS License Agreement allows the Studio Defendants collectively to retard innovation by  
14 controlling and dictating the pace at which new products become available in the relevant  
15 market and the features that they offer, rather than permitting the evolution of technology in  
16 the relevant market to be driven by competition.

17  
18 (c) The potential elimination of RealNetworks as a competitor in the relevant  
19 market.

20 126. These anticompetitive and exclusionary effects are not offset by sufficient pro-  
21 competitive effects or purposes. To obtain the efficiencies associated with an encryption system  
22 it is not necessary or helpful to end competition in the market for providing consumers the  
23 technology to make legal persistent copies of DVDs. Even if such a restriction furthers the  
24 efficiency goals of the DVD CCA to some extent, which it does not, such benefits would be  
25 outweighed by the competitive harms inflicted by this naked group boycott.

26 127. Moreover, as the "Managed Recording" sections of the Procedural Specifications  
27 to the CSS License Agreement demonstrate, collective action relating to the licensing of a given  
28 Studio's content was not required.

1 128. Consequently, the Studio Defendants' and DVD CCA's interpretation of the CSS  
2 License Agreement, by which they have denied RealNetworks the right to use the encryption  
3 technology that it has licensed from the DVD CCA unless and until RealNetworks assents to the  
4 DVD CCA's and the Studio Defendants' demands that it exit the relevant market, have rendered  
5 the CSS License Agreement void under Section 1 (if their interpretation is held to be correct), or  
6 amounted to a *de facto* agreement in violation of Section 1 (if their interpretation is held not to be  
7 correct).

8 129. The DVD CCA and the Studio Defendants are liable under Section 1 of the  
9 Sherman Act to RealNetworks for damages in an amount to be proven at trial, including, without  
10 limitation, the lost business and reduction in company value RealNetworks has suffered as a  
11 direct result of the conspiracy, which damages should be trebled pursuant to 15 U.S.C. § 15(a),  
12 plus interest, costs and expenses, including attorneys' fees.

#### 13 **FOURTH CAUSE OF ACTION**

##### 14 ***Group Boycott in Violation of Section 1 of the Sherman Act***

##### 15 ***(Collective Refusal to Deal – Against the Studio Defendants Only)***

16 130. RealNetworks incorporates the allegations of paragraphs 1 through 91 as if fully  
17 set forth herein.

18 131. Apart from the actions taken through the vehicle of the DVD CCA, the Studio  
19 Defendants have entered into an agreement by which they have collectively refused to deal with  
20 RealNetworks as a way of eliminating RealNetworks as a competitor in the market for  
21 technology that enables consumers to (a) create or otherwise obtain digital copies of movies and  
22 TV shows that they own on DVDs and (b) store and manage those copies electronically (e.g., on  
23 a hard drive) for subsequent playback.

24 132. The Studio Defendants conspired and reached a collusive agreement to engage in  
25 a collective refusal to deal with RealNetworks. RealNetworks attempted to negotiate in good  
26 faith with each of the Studio Defendants in advance of the release of its Vegas product to resolve  
27 the Studio Defendants' stated concerns with the product. In its negotiations with one studio,  
28 RealNetworks and that studio negotiated what RealNetworks believed was a near-final



1 agreement that would have enabled RealNetworks to release its Vegas product for use with that  
2 studio's copyrighted content. On the eve of the release, however, the studio indicated that it was  
3 not prepared to break with the Studio cartel without substantial payment. The exorbitant sum  
4 demanded by the studio bore no relationship to the commercial terms of the deal under  
5 negotiation. These facts reveal the existence of an agreement among the Studio Defendants to  
6 refuse to negotiate individually with Real.

7 133. The Studio Defendants entered into the collective boycott, and acted in  
8 furtherance of their conspiracy, with the intent to harm competition for the provision of  
9 technology in the relevant market.

10 134. The Studio Defendants' collective boycott and conduct in furtherance of their  
11 conspiracy has had a direct and substantial effect on interstate trade and commerce.

12 135. RealDVD competes with products currently offered by the Studio Defendants, as  
13 well as with products that the Studio Defendants have stated they intend to offer in the near  
14 future. Absent their unlawful agreement, the Studio Defendants would otherwise have competed  
15 directly with one another, and with other Studios and technology providers like RealNetworks, to  
16 develop technology in the relevant market.

17 136. The Studio Defendants' unlawful contract, combination, conspiracy and  
18 agreement in unreasonable restraint of interstate trade and commerce constitutes a *per se*  
19 violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

20 137. The Studio Defendants' unlawful contract, combination, conspiracy and  
21 agreement in unreasonable restraint of interstate trade and commerce also violates Section 1 of  
22 the Sherman Act, 15 U.S.C. § 1, under the Rule of Reason. The market for technology that  
23 enables consumers to (a) create or otherwise obtain digital copies of movies and TV shows that  
24 they own on DVDs and (b) store and manage those copies electronically (*e.g.*, on a hard drive)  
25 for subsequent playback, is a relevant product market within the meaning of the antitrust laws.  
26 The relevant geographic market is the United States. The co-conspiring Studio Defendants  
27 control an element essential to effective competition in the relevant market and are using the  
28

1 control that they exert over that element to inhibit RealNetworks' competition with them in the  
2 relevant market.

3 138. The anticompetitive and exclusionary effects of the Studio Defendants' unlawful  
4 collective boycott have caused:

5 (a) A significant reduction in consumer welfare. By refusing to negotiate  
6 individual licenses for their content with RealNetworks, the Studio Defendants have  
7 effectively agreed to fix the prices they will charge for that privilege, resulting in a  
8 significant increase in the price consumers now pay and will pay to obtain digital copies of  
9 the DVDs they already have purchased.

11 (b) The retardation of innovation in the relevant market. By refusing to  
12 negotiate individual licenses for their content with RealNetworks, the Studio Defendants  
13 have ensured their ability to control and dictate the pace at which new products become  
14 available and the features that they offer, rather than permitting the evolution of technology  
15 in the relevant market to be driven by competition.

17 (c) The potential elimination of RealNetworks as a competitor in the relevant  
18 market.

19 139. These anticompetitive and exclusionary effects are not offset by sufficient pro-  
20 competitive effects or purposes. To obtain the efficiencies associated with an encryption system  
21 it is not necessary or helpful to end competition in the market for providing consumers the  
22 technology to make legal, persistent copies of DVDs. Even if such a restriction further the  
23 efficiency goals of the DVD CCA to some extent, which it does not, such benefits would be  
24 outweighed by the competitive harms inflicted by this naked group boycott.

25 140. Moreover, as the "Managed Recording" sections of the Procedural Specifications  
26 to the CSS License Agreement demonstrate, collective action relating to the licensing of a given  
27 Studio's content was not required.

28

1 141. The Studio Defendants are liable under Section 1 of the Sherman Act to  
2 RealNetworks for damages in an amount to be proven at trial, including, without limitation, the  
3 lost business and reduction in company value RealNetworks has suffered as a direct result of the  
4 conspiracy, which damages should be trebled pursuant to 15 U.S.C. § 15(a), plus interest, costs  
5 and expenses, including attorneys' fees.

6 **FIFTH CAUSE OF ACTION**

7 ***Violation of the Cartwright Act (Bus. & Prof. Code § 16700 et seq.)***

8 142. RealNetworks incorporates the allegations of paragraphs 1 through 103 as if fully  
9 set forth herein.

10 143. The DVD CCA's and co-conspiring Studio Defendants' collective boycotts and  
11 conduct in furtherance of their conspiracy violates section 16720 of the Cartwright Act, Cal. Bus.  
12 & Prof. Code § 16720.

13 144. The DVD CCA's and co-conspiring Studio Defendants' collective boycotts and  
14 conduct in furtherance of their conspiracy have no legitimate business objective and  
15 unreasonably harm competition in the state of California.

16 145. The DVD CCA and the Studio Defendants should be enjoined from engaging in  
17 further unlawful conduct and are liable under Section 16720 of the California Cartwright Act to  
18 RealNetworks for damages in an amount to be proven at trial, including, without limitation, the  
19 lost business and reduction in company value RealNetworks has suffered as a direct result of the  
20 conspiracy, which damages should be trebled pursuant to §16750 of the Cartwright Act, plus  
21 interest, costs and expenses, including attorneys' fees.

22 **SIXTH CAUSE OF ACTION**

23 ***Violation of California Unfair Competition Law (Bus. & Prof. Code § 17200 et seq.)***

24 146. RealNetworks incorporates the allegations of paragraphs 1 through 107 as if fully  
25 set forth herein.

26 147. In engaging in their collective boycotts and conduct in furtherance of their  
27 conspiracy, the DVD CCA and the co-conspiring Studio Defendants have individually and  
28 collectively engaged in fraudulent, misleading, unfair and illegal business practices in violation

1 of Section 17200 of the California Business and Professions Code. Due to the DVD CCA's and  
2 the co-conspiring Studio Defendants' unfair business practices, RealNetworks has been injured  
3 in its ability to compete in the relevant market and has suffered and continues to suffer direct and  
4 substantial injuries.

5 148. The DVD CCA and the Studio Defendants should be enjoined from engaging in  
6 further unfair business conduct, and are liable to RealNetworks for costs and expenses, including  
7 attorneys' fees.

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 10 REALNETWORKS, INC. and  
 REALNETWORKS HOME  
 11 ENTERTAINMENT, INC.

12 (additional counsel listed on following page)

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 REALNETWORKS, INC., a Washington  
 Corporation; and REALNETWORKS HOME  
 16 ENTERTAINMENT, INC., a Delaware  
 corporation,

17 Plaintiffs,

18 v.

19 DVD COPY CONTROL ASSOCIATION, INC., a  
 20 Delaware nonprofit corporation, DISNEY  
 ENTERPRISES, INC., a Delaware corporation;  
 21 PARAMOUNT PICTURES CORP., a Delaware  
 corporation; SONY PICTURES ENTER., INC., a  
 22 Delaware corporation; TWENTIETH CENTURY  
 FOX FILM CORP., a Delaware corporation; NBC  
 23 UNIVERSAL, INC., a Delaware corporation;  
 WARNER BROS. ENTER. INC., a Delaware  
 24 corporation; and VIACOM, Inc., a Delaware  
 Corporation,

25 Defendants.  
 26

27 AND RELATED CASES  
 28

Case Nos. C08 04548 MHP;  
 C08 04719 MHP

**[PROPOSED] ORDER GRANTING  
 PLAINTIFFS' MOTION FOR LEAVE  
 TO FILE SECOND AMENDED  
 COMPLAINT FOR DECLARATORY  
 RELIEF AND FOR VIOLATION OF  
 SHERMAN ACT AND STATE LAW**

**Before: Hon. Marilyn Hall Patel  
 Dept: Courtroom 15  
 Date: June 22, 2009  
 Time: 2:00 p.m.**



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1 The motion of Plaintiffs and Counter-Complaint Defendants RealNetworks, Inc. and  
2 RealNetworks Home Entertainment, Inc. (collectively, "RealNetworks") for leave to file a  
3 Second Amended Complaint for Declaratory Relief and for Violation of Sherman Act and State  
4 Law against the DVD Copy Control Association ("DVD CCA") and Disney Enterprises, Inc.,  
5 Paramount Pictures Corp., Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corp.,  
6 Warner Brothers Entertainment, Inc.; NBC Universal, Inc. and Viacom, Inc., came on regularly  
7 for hearing before this Court on \_\_\_\_\_.

8 After considering the moving and opposition papers, arguments of counsel, and  
9 all other matters presented to the Court, IT IS HEREBY ORDERED THAT the motion is  
10 GRANTED.

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12 **IT IS SO ORDERED.**

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14 Dated:

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16 \_\_\_\_\_  
17 Hon. Marilyn Hall Patel  
18 United States District Judge  
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